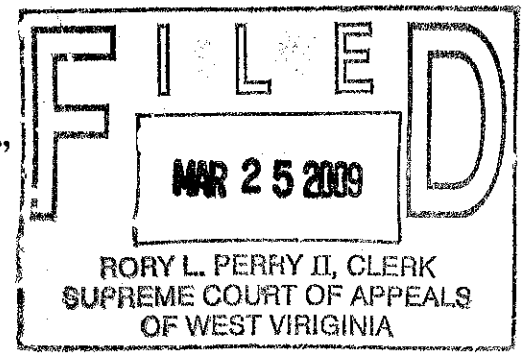
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 34702



LLOYD MICHAEL NOLAND, R.N.,

APPELLANT,

V.

VIRGINIA INSURANCE RECIPROCAL, and THE RECIPROCAL GROUP, INC., a Virginia Corporation, LISA HYMAN, individually, COVERAGE OPTIONS ASSOCIATES a.k.a. KENTUCKY HOSPITAL SERVICE COMPANY, a Kentucky Limited Liability Company, KENTUCKY HOSPITAL ASSOCIATION, a Kentucky Corporation, and RICHARD STOCKS,

APPELLEES.

BRIEF OF APPELLEE RICHARD STOCKS

Jeffrey M. Wakefield (WV State Bar No. 3894)
Jaclyn A. Bryk (WV State Bar No. 9969)
Elizabeth L. Taylor (WV State Bar No. 10270)
Flaherty, Sensabaugh & Bonasso, PLLC
Post Office Box 3843
Charleston, West Virginia 25338
Telephone: (304) 345-0200
Facsimile: (304) 345-0260
Counsel for Richard Stocks

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

The petitioner, Lloyd Michael Noland, R.N. ["Noland"] appeals the December 18, 2006, December 20, 2006 and March 12, 2007 Orders from the Circuit Court of Raleigh County, West Virginia [the "Circuit Court"], dismissing Richard Stocks ["Stocks"], Lisa Hyman ["Hyman"] and Coverage Options Associates ["COA"], and Kentucky Hospital Association ["KHA"] from the underlying action titled Lloyd Michael Noland, R.N. v. Virginia Insurance Reciprocal; The Reciprocal Group, Inc.; Lisa Hyman; Coverage Options Associates; Kentucky Hospital Corporation; and Richard Stocks and bearing Civil Action No. 01-C-609-B [the "underlying action"]. The December 20, 2006 and March 12, 2007 Orders were made final and appealable as to Hyman, COA, and KHA by Order dated March 28, 2008. On August 21, 2008, the Circuit Court of Raleigh County entered a final and appealable Order dismissing Stocks.

In the underlying action, Noland originally sought, in part, a determination that the Virginia Insurance Reciprocal ["VIR"] had a duty to defend and indemnify him in a medical malpractice action under two insurance policies issued to Appalachian Regional Healthcare, Inc. ["ARH"] doing business as Beckley Appalachian Regional Hospital ["BARH"]. Noland amended his complaint four years after filing the underlying action and over five years after VIR denied coverage to name Hyman, COA, KHA, and Stocks as additional parties. These additional parties are all alleged to have handled the adjustment of Noland's claim. Stocks, in particular, was the Second Vice President of Claims for VIR. Noland asserted causes of action for statutory bad faith under the West Virginia Unfair Trade Practices Act ["UTPA"], W.Va. Code § 33-11-1, *et seq.*, and common law bad faith against all defendants. The additional parties immediately moved to dismiss both bad faith claims. Specifically, Stocks argued that Noland could not maintain his common law bad faith claim because Stocks was not a party to the insurance policies at issue. Stocks also argued that Noland could not maintain his statutory bad faith claim

because Noland did not raise the claim within the applicable one year statute of limitations which began to run on the date VIR denied coverage.

The Circuit Court granted Stocks' motion by Order dated December 18, 2006, Hyman's motion by Order dated December 20, 2006, and KHA and COA's motion by Order dated March 12, 2007. The Circuit Court held, in relevant part, that Noland failed to assert his statutory bad faith claim within the one year statute of limitations applicable to first-party claims. Noland moved to reconsider the rulings, which the Circuit Court denied in a hearing on March 5, 2008.

Noland filed his Petition for Appeal on July 17, 2008. This Court granted Noland's petition on January 22, 2009. Noland filed his Brief of Appellant, Lloyd Michael Noland, R.N., ["Brief of Appellant"] on February 23, 2009. Noland seeks, in part, reversal of Stocks, Hyman, COA and KHA's dismissal arguing that the Circuit Court erred in granting the motions with regard to the statutory bad faith claim by holding that the one year statute of limitations began to run on the date VIR denied coverage rather than when the underlying cause of action giving rise to the claim is ultimately resolved.

Stocks timely files his Brief of Appellee in response to Noland's Brief of Appellant and respectfully requests that this Honorable Court deny Noland's Brief of Appellant and uphold the Circuit Court of Raleigh County's December 18, 2006 Order dismissing Stocks and the August 21, 2008 Order denying Noland's Motion to Reconsider.

STATEMENT OF FACTS

The underlying action stems from a medical malpractice action filed in the Circuit Court of Kanawha County on August 12, 1998, by Ireland and Charlene Noel [collectively the "Noels"] against ARH doing business as BARH. Amended Complaint (Oct. 25, 2005). The Noels alleged that BARH, as well as its agents, servants, and/or employees deviated from the

accepted standards of care in the treatment of Ireland Noel on December 18, 1997. Id. at ¶ 13. Noland was one of a number of personnel who rendered medical treatment to Ireland Noel. Id. However, Noland was not named a defendant in the Noels' medical malpractice action. Id.

At the time of the alleged events, BARH was insured by a Comprehensive Hospital Liability Policy, being Policy No. KPL2999998 [the "Primary Policy"], and a Health Care Umbrella Policy, being Policy No. KYUM 2999998 [the "Umbrella Policy"], issued by Reciprocal of America ["Reciprocal"], formerly VIR, to Appalachian Regional, but including BARH as an insured by endorsement. Reciprocal retained counsel to defend BARH in the Noels' medical malpractice action. Id. at ¶ 15. On May 24, 2000, BARH filed a third-party complaint against Noland seeking contribution and/or indemnity from Noland. Id. at ¶18. On August 1, 2000, the Noels settled their medical malpractice claims against BARH for an amount extinguishing the Primary Policy. Id. at ¶ 22. BARH maintained its contribution action against Noland. Id. at ¶ 25.

On June 19, 2001, Noland filed the underlying action against Reciprocal and VIR seeking declaratory relief under the Primary Policy and alleging bad faith. Id. at ¶ 18. Over four years later, on August 25, 2005, Noland was granted leave to file the Amended Complaint asserting common law and statutory bad faith causes of action against Hyman, COA, KHA, and Stocks. COA adjusted claims for VIR in West Virginia and was alleged to be a wholly owned subsidiary of KHA. Hyman was an adjuster from COA handling Noland's claim on behalf of VIR. Stocks was the Second Vice President of Claims for VIR. On December 5, 2005, Hyman, COA, KHA, and Stocks filed motions to dismiss Noland's cause of action for statutory bad faith as the claim fell outside the applicable one year statute of limitations. Hyman, COA, KHA, and Stocks

further sought dismissal of Noland's common law bad faith causes of action for want of any contractual relationship under the insurance policies at issue.

On December 18, 2006, the Circuit Court granted Stocks' motion to dismiss both the common law and statutory bad faith claims. The Circuit Court dismissed Noland's cause of action for common law bad faith holding that Noland could not assert this cause of action against Stocks in the absence of a contractual relationship with Stocks under the Primary Policy. Order (Dec. 18, 2006) at p. 5. The Circuit Court also dismissed Noland's cause of action for statutory bad faith holding that Noland failed to bring this cause of action within the applicable one year statute of limitations. Id. at p. 8. Specifically, the Circuit Court held that the one year statute of limitations on a first-party bad faith claim was calculated from VIR's denial of coverage to Noland. Finally, the Circuit Court held that Noland's Amended Complaint did not relate back under Rule 15(c) of the West Virginia Rules of Civil Procedure since the exclusion of Stocks from the original complaint was not due to any mistake of law or fact. Id. at p. 9. The Circuit Court entered a nearly identical Order dismissing Hyman on December 20, 2006. The Circuit Court cited its Orders dismissing Stocks and Hyman in its March 12, 2007 Order dismissing the statutory bad faith claims against COA and KHA.

On January 31, 2007, Noland filed his motion for reconsideration or, in the alternative, motion to make the orders granting Stocks, Hyman, COA, and KHA's motions to dismiss final and appealable orders. Noland asserted that the Circuit Court not only applied an improper standard in granting Stocks and Hyman's motions to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, but also erroneously adopted the rationale set forth in Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003), to hold that the statute of

limitations lapsed for the statutory bad faith claim one year after VIR denied coverage. Noland did not challenge the Circuit Court's rulings dismissing the common law bad faith claims.

On March 5, 2008, the Circuit Court heard oral arguments on Noland's motion to reconsider. The Circuit Court denied Noland's motion to reconsider by Order dated March 28, 2008, but granted his motions to make the subject Orders final and appealable. As a result, Noland filed a Petition for Appeal on July 17, 2008, which this Court granted on January 22, 2009. Noland filed the current Brief of Appellant, Lloyd Michael Noland, R.N., on February 23, 2009. Stocks timely files his Brief of Appellee in response to Noland's Brief of Appellant.

ARGUMENT

I. THE CIRCUIT COURT DID NOT APPLY AN IMPROPER STANDARD IN GRANTING RESPONDENTS' MOTIONS TO DISMISS.

Noland argues that the Circuit Court applied an improper standard in granting Stocks' motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Specifically, Noland argues that the Circuit Court improperly ruled upon issues of fact relative to the statutory bad faith claims against Stocks. However, Noland ignores the fact that the Circuit Court granted Stocks' motion to dismiss as a matter of law because Noland failed to bring his statutory bad faith claims within the applicable one year statute of limitations. The Circuit Court did not rule on the merits of the statutory bad faith claims in lieu of the fundamental legal question of whether the claims were timely asserted. Even if the Circuit Court did make findings of fact, such findings would not override the dismissal since the claims were dismissed as a matter of law. Accordingly, Noland's appeal on this ground should be denied.

Rule 12(b)(6) provides as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is

> required, except that the following defenses may at the option of the pleader be made by motion:
>
> * * *
>
> (6) failure to state a claim upon which relief can be granted, ...

W.Va.R.Civ.P. 12(b)(6) (2008). Admittedly, "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (internal citations omitted) Syl. Pt. 2, McCormick Walmart Stores, 215 W.Va. 679, 600 S.E.2d 576 (2004). However, the liberality of Rule 12(b)(6) is tempered by statutes of limitations.

"The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a reasonable time." Perdue v. Hess, 199 W.Va. 299, 303, 484 S.E.2d 182, 186 (1997). As this Court stated in Perdue, "[b]y strictly applying statutes of limitations, we are better able to ensure that causes of action are promptly and timely filed." Id. "Statutes of limitations represent a pervasive legislative judgment ... that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" Province v. Province, 196 W.Va. 473, 482, 473 S.E.2d 894, 903 (1996) quoting United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations omitted). "Once the defendant shows that the plaintiff has not filed his or her complaint within the applicable statute of limitations, the plaintiff has the burden of showing an exception to the statute." Syl. pt. 3, in part, Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992) cited in Worley v. Beckley Mechanical, Inc., 220 W.Va. 633, 639, 648 S.E.2d 620, 626 (2007). Without an exception, claims filed after the running of the applicable statutes of limitations must be dismissed.

The Circuit Court dismissed the statutory bad faith claim against Stocks as Noland failed to assert this claim within the applicable one year statute of limitations. Although Noland asserts that the Circuit Court erroneously determined that the statute of limitations began to run upon VIR's denial of coverage, Noland does not assert any exception to the statute of limitations. Noland's only arguments are that his UTPA claims[1] are valid and that there are questions of fact regarding breach of duty under the UTPA[2] to be resolved by a jury. However, Noland's failure to timely bring the statutory bad faith claim voids the claim as a matter of law regardless of the purported validity of the claim. To hold otherwise would make statutes of limitations essentially meaningless. Further, Noland does not identify any impermissible findings of fact in the December 18, 2006 Order dismissing Stocks. The fact is that Noland failed to timely bring his claim and the Circuit Court properly dismissed the claim as a result. Noland should not be permitted to resurrect that claim beyond the statute of limitations because he believes his claims are valid especially in the absence of any valid exception to the statute of limitations. Accordingly, Stocks requests this Court reject Noland's appeal on this ground.

II. THE CIRCUIT COURT PROPERLY DISMISSED NOLAND'S CAUSES OF ACTION FOR STATUTORY BAD FAITH.

A. The Circuit Court properly commenced the one year statute of limitations applicable to statutory bad faith claims from VIR's denial of coverage.

---

[1] Noland incorrectly argues that the Circuit Court, in its December 18, 2006, December 20, 2006, and March 12, 2007 Orders, only focused on the common law duty of good faith and fair dealing and the statutory duty to provide a defense. The Circuit Court properly focused on the one year statute of limitations for the UTPA when granting Stocks, COA, KHA, and Hyman's Motions to Dismiss.

[2] There are no questions of fact regarding the alleged UTPA violations because any other duties under the UTPA that arise out of a determination of coverage ceased with the denial of the claim. Noland's injury was complete when he was denied coverage. Thus, any continuing violations under the UTPA do not exist because the obligation to obtain separate adjusters and to obtain separate counsel for Noland flow from a determination of coverage and those obligations and duties ceased when Noland was denied coverage.

Noland argues that the Circuit Court erroneously concluded that there is a distinction between first-party and third-party statutory bad faith claims and, in so concluding, erroneously held that the one year statute of limitations for first-party bad faith claims commences from the denial of coverage. Noland argues that the statute of limitations for first-party bad faith claims, like third-party claims, does not accrue until the appeal period has expired on the underlying cause of action upon which the claim is predicated. However, Noland offers nothing more than reliance on syllabus point 7 of Klettner v. State Farm Mut. Auto. Ins. Co., 205 W.Va. 587, 519 S.E.2d 870 (1999), while ignoring the context of Klettner giving rise to this holding. In so doing, Noland fails to acknowledge the fundamental distinctions between first-party and third-party statutory bad faith claims justifying the differing treatment. As VIR formally denied coverage to Noland, a VIR insured, under the Primary Policy on October 24, 2000, Noland had until October 24, 2001, to raise statutory bad faith claims. He did not raise these claims until October 31, 2005. Therefore, the Circuit Court properly dismissed Noland's causes of action for statutory bad faith based on the statute of limitations.

Statutory bad faith claims are subject to a one year statute of limitations. W.Va. Code § 55-2-12(c) (1994). However, the date on which the statute of limitations begins to accrue differs depending on whether the statutory bad faith action was initiated by a first-party or a third-party claimant. See e.g. Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857, 870 (N.D.W.Va. 2003) (affording first-party one year from the insurer's denial of her claim to assert statutory bad faith); Syl. pt. 1, Klettner, 205 W.Va. 587, 519 S.E.2d 870 (certified question as to tolling statute of limitations for statutory bad faith claim brought by third-party claimant until the underlying tort action was ultimately resolved). The distinction between when the statute of limitations accrues in a first-party case as opposed to a third-party claim is based upon policy considerations as to

when such claims may be prosecuted. This Court recognized long ago that a third-party claim should not proceed until after the underlying litigation was resolved. In the seminal case of Jenkins v. J.C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981) three reasons were enunciated for not permitting a claim to go forward until the underlying matter was finalized:

> (1) "To permit a direct action against the insurance company before the underlying claim is ultimately resolved may result in duplicitous litigation since the issue of liability and damages as they relate to the statutory settlement duty are still unresolved in the underlying claim."
>
> (2) "A further policy reason to delay the bringing of the statutory claim is that once the underlying claim is resolved, the claimant may be sufficiently satisfied with the result so that there will be no desire to pursue the statutory claim."
>
> (3) To avoid the prejudicial impact of mentioning insurance coverage at trial.

While this Court later allowed a third-party UTPA claim to be joined with the underlying litigation, see State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994), it nonetheless continued to embrace the principle that such claims cannot proceed until the underlying matter was resolved by requiring an automatic stay of the UTPA action. The concerns expressed by this Court in combining statutory bad faith claims with the underlying action in third-party bad faith actions do not exist in first-party actions and, therefore, the statute of limitations should begin to run from the moment the insurer denies coverage rather than toll until the underlying action is ultimately resolved.

In Klettner, this Court held, on certified question, that the one year statute of limitations for third-party bad faith claims did not begin to run until the appeal expired on the underlying tort cause of action. This Court's holding was based on its prior holding in Jenkins v. J.C. Penney Cas. Ins. Co., another third-party statutory bad faith action, in which it held that, "[a]n

implied private cause of action may exist for a violation by an insurance company of the unfair settlement practice provisions of W.Va. Code 33-11-4(9); but such implied private cause of action cannot be maintained until the underlying suit is resolved." Jenkins, 167 W.Va. at 598, 280 S.E.2d at 253 quoted in Klettner, Id. at 590, 873. As previously noted, the Jenkins rule was overruled in part by another third-party statutory bad faith action, State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994), where this Court held that third-party statutory bad faith claims could be joined with the underlying claim as long as the claims against the insurer were bifurcated from those against the insured. In Klettner, this Court noted that it modified Jenkins for economic reasons as well as to "continue the long-standing policy of avoiding unnecessary mention of insurance coverage at trial because of the possibility of prejudicial impact on the jury." Madden, Id. at 158-159, 724-725 quoted in Klettner, 205 W.Va. at 592, 519 S.E.2d at 875. However, in pointing out that it had, "never retreated from our original stance that resolution of the issue of damages and liability is a necessary prerequisite to proceeding with a statutory bad faith claim[,]" this Court noted the concerns resulting in the Jenkins and Madden rules for third-party bad faith actions did not apply in first-party bad faith actions:

> In Light v. Allstate Insurance Co., 203 W.Va. 27, 506 S.E.2d 64 (1998), we recently discussed the "clear distinction between a first-party and a third-party bad faith claim." Id. at 34, 506 S.E.2d at 71. Given the fact that an insurer is the named defendant in the bad faith claim as well as the underlying tort action in a first-party action, we stated that the insurance mentioning concern that has historically been part of the basis for delaying third-party bad faith claims until the underlying claim is resolved does not come into play in a first-party claim. Because the instance case is a third-party claim, our discussion in Light concerning this distinction is of no relevance to the decision in this case.

Klettner, Id. at fn. 11.[3] As such, this Court concluded that the statute of limitations did not accrue until the appeal period had expired in the underlying cause of action upon which the third-party statutory claim was predicated. Id. at 593, 876.

In Johnson v. Acceptance Ins. Co., the United States District Court for the Northern District of West Virginia analyzed the role of Klettner in a first-party statutory bad faith action. 292 F.Supp.2d at 870. In Johnson, the insurer denied coverage to its insured for a lawsuit brought against it by a third-party. The insured assigned to the third-party its rights to seek coverage and assert bad faith against the insurer. The third-party, now the plaintiff in Johnson, filed suit against the insurer seeking coverage and asserted a first-party statutory bad faith claim on the insured's behalf and his own third-party statutory bad faith claim. In this decision, the District Court addressed a number of motions including the insurer's motion for summary judgment on the third-party statutory bad faith claims as well as the insurer's motion for summary judgment on the first-party statutory bad faith claim as the plaintiff failed to file within the one year statute of limitations.

In deciding the insurer's motion for summary judgment relative to the first-party bad faith claim, the Northern District recognized that in third-party bad faith actions "the statute of limitations for a claim under the [UTPA] begins to run when 'the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated.'" Klettner, 205 W.Va. at 593, 519 S.E. 2d at 876 quoted in Johnson, Id. In a first-party unfair claim settlement

[3] In Berry v. Nationwide Mut. Fire Ins. Co., 181 W.Va. 168, 173, 381 S.E.2d 367, 371 (1989), the Supreme Court differentiated Jenkins in determining that the lower court correctly denied a motion to bifurcate breach of contract and punitive damages issues in a first-party action. As the Supreme Court stated, "[o]ur holding in Jenkins, that an implied private cause of action against an insurance company may not be maintained until the underlying claim is resolved, was based on the potential prejudicial impact that combining the action would have on the jury. [citation omitted] In the case now before us, the appellees, the insureds, brought an action against their *own* insurance company, not the original tortfeasor's insurance company. Clearly, there was not a third party in this case that was prejudiced by trying the breach of contract issue with the issue of punitive damages."

practices act claim, "[t]he statutory claim at issue ... is predicated on [the insurer's] unfair settlement practice in ***denying coverage for the underlying claim.***" (***emphasis*** added) Johnson, Id. Therefore, the insured's first-party claim had to be filed within one year of the denial of coverage since the first-party statutory bad faith claim was predicated on the denial. Id. Since the insured, via the plaintiff, failed to do so, the statutory bad faith claim was barred by the statute of limitations. Id.

VIR formally denied coverage to Noland on October 24, 2000. Amended Complaint at ¶ 24. As a first-party claimant, Mr. Noland had until October 24, 2001, to assert statutory bad faith claims. Accordingly, the Circuit Court properly dismissed Noland's bad faith claims as Noland failed to assert them within one year of the denial of coverage. See e.g. Johnson, 292 F.Supp.2d at 870; Light, 203 W.Va. at 34, 506 S.E.2d at 71. The rationale applied in Johnson is equally applicable to this case as the rationale for the tolling of third-party statutory bad faith claims by this Court in Klettner does not apply in a first-party situation.

The rationale behind this Court's tolling of the statute of limitations in third-party statutory bad faith actions is to preclude the probable prejudice resulting from a jury's knowledge that the tortfeasor has insurance coverage. Madden, 192 W.Va. at 158-159, 421 S.E.2d at 724-725. As this Court noted in Berry and Light and the District Court noted in Johnson, prejudicial impact is not a concern in a first-party statutory bad faith action. Johnson, 292 F.Supp.2d at 870; Light, 203 W.Va. at 34, 506 S.E.2d at 71; Berry, 181 W.Va. at 173, 381 S.E.2d at 371. This is especially true in the current action since the Noels' medical malpractice action has settled and there is no probability of a prejudicial impact on that case. Klettner contemplates a situation as contemplated when the Noels' attorney amended the medical

malpractice complaint to add third-party causes of action against VIR; not a first-party cause of action brought by Noland as an insured against VIR as his insurer.

Further, tolling the one year statute of limitations to prevent duplicitous and unnecessary litigation is not a concern in a first-party statutory bad faith action. In the third-party context, alleged bad faith may be cured throughout the litigation of the underlying claim. As this Court noted in Light, a first-party's statutory bad faith claim is predicated on the denial of coverage. Light, 203 W.Va. at 34, 506 S.E.2d at 71. Generally, third-parties maintain underlying actions for damages against insured tortfeasors. Accordingly, once the insured's liability is determined and the third-party's claims are settled, the third-party's statutory bad faith claims may become irrelevant and unnecessary. This is not the case in first-party statutory bad faith actions. First-party statutory bad faith actions are predicated on the insurer's refusal to defend or indemnify its insured. The insurer is out of the picture once the insurer denies coverage to a first-party. A first-party's subsequent suit for coverage or to allege bad faith in the denial of coverage would not be duplicitous and unnecessary as is probable in a third-party claim because there is no way that the alleged breaches can be cured with the insurer removed from the underlying action against the insured. Therefore, this Court's concerns as to unnecessary and duplicitous litigation in third-party statutory bad faith actions do not exist in first-party action. Consequently, the statute of limitations on Noland's cause of action accrued on the date that VIR denied coverage, October 24, 2000. Since Noland failed to raise this cause of action on or before October 24, 2001, the Circuit Court properly dismissed his statutory bad faith claims. Accordingly, Stocks requests this Court deny Noland's appeal on this ground.

In this vein, Noland's argument that accrual of the statute of limitations in first-party cases with the denial of coverage somehow places a third-party claimant in a better position is

not well taken. In fact, the opposite is true. The first-party claimant is granted the right and duty to pursue his claim in an earlier fashion than the third-party claimant who must wait an extended period of time before seeking redress for an UTPA violation. As such, Stocks requests this Court deny Noland's appeal on this ground.

B. The Circuit Court did not err in adopting the reasoning set forth in Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003), as Johnson is not in violation of West Virginia law.

Noland argues that the Circuit Court erred in adopting the reasoning of Johnson that there are distinguishing factors between first and third-party statutory bad faith claims with regard to the tolling of the one year statute of limitations. Noland believes that the holding in Johnson is contrary to syllabus point 7 of Klettner providing that the one year statute of limitations applicable to statutory bad faith claims does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated. Noland's sole argument is that if this Court intended syllabus point 7 of Klettner to apply only to third-party statutory bad faith claims it would have said so in the syllabus point. This argument, without any further elaboration, completely ignores the rationale behind Klettner and the fact that this Court dealt solely with third-party statutory bad faith claims on certified question in Klettner. To the contrary, Johnson is not in violation of West Virginia law and the Circuit Court did not error in adopting the reasoning set forth in Johnson in dismissing Noland's first-party statutory bad faith claims based on the statute of limitations. Accordingly, Stocks requests this Court deny Noland's appeal on this ground.

Noland, in the absence of any authority contrary to Johnson, is promoting the position that published opinions giving rise to syllabus points are irrelevant. A published decision giving rise to a syllabus point is not mere *obiter dicta* without any precedential value as Noland would

like this Court to believe. Only expressions in court opinions which go beyond the facts before the court and, therefore, are individual views of the author of the opinion, are not binding in subsequent cases. Walker v. Doe, 210 W.Va. 490, 495, 558 S.E.2d 290, 295 (2001). As this Court recognized with regard to *per curiam* opinions, "[w]ere we to view nothing but the syllabus, which in a *per curiam* decision of this Court is simply those points of law previously decided in other cases, as worthy of precedential value, we would be discarding many valuable cases in which the presence of unique facts has required this Court to determine whether settled legal precepts applied to those distinct factual scenarios." Id. This argument is heightened in the case of the published decision accompanying the syllabus. To read a syllabus point in a vacuum is nonsensical and completely disregards the rationale behind the statement of law set forth in the syllabus.

Moreover, federal courts sitting in diversity cases apply the law of the forum state. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). "A federal court sitting in diversity has a duty to apply the operative state law as would the highest court of the state in which the suit was brought." Sias ex rel. Mabry v. Wal-Mart Stores, Inc., 137 F.Supp.2d 699, 700 (S.D.W.Va. 2001). But, "[w]here there is no case law from the forum state which is directly on point, the district court attempts to do as the state court would do if confronted with the same fact pattern." Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994). The District Court's decision in Johnson is a valid Erie decision since this Court has not specifically determined when the statute of limitations for first-party statutory bad faith claims accrues. As such, Johnson is persuasive and may be taken into determination by the Circuit Court in the absence of West Virginia law specifically on point. And, as discussed in the preceding section, Johnson is not contrary to West

Virginia law. Therefore, the Circuit Court's adoption of Johnson was not misplaced and Noland's appeal on this ground should be denied.

Furthermore, Johnson is not inapplicable to this case as Noland contends. Noland erroneously argues that Johnson is inapplicable as it was decided under the premise that there is no post-suit bad faith in violation of Barefield v. DPIC Companies, Inc., 215 W.Va. 544, 600 S.E.2d 256 (2004). In Barefield, this Court held that the UTPA applied to insurer's conduct relative to the defense of the insured and the settlement of the underlying case against the insured. However, Noland completely misconstrues Johnson. Johnson presented both a third-party and a first-party bad faith claim predicated upon a denial of coverage. In the portion of the decision denying the insurer's motion for summary judgment relative to the *third-party* bad faith claim, the District Court states, in *dicta*, that it will not consider the insurer's conduct after the denial of coverage and after the filing of the declaratory judgment action, which was filed after the denial of coverage and competition of the underlying action. The District Court cites cases noting that when an insurer's post-suit conduct has some relevance to the insured's bad faith claim, a court must weigh the probative value against the inherently high prejudice of admitting an insurer's post-suit conduct, keeping in mind the insurer's fundamental right to defend itself in suit brought against the insurer by its insured. See Palmer v. Farmers Ins. Exch., 861 P.2d 895 (Mont. 1993) cited in Johnson, 292 F.Supp.2d at 869. See also Palmer v. Ted Stevens Honda, 193 Cal.App.3d 530 (Cal. Ct. App. 1987) cited in Johnson, Id. The District Court *does not* hold that post-suit breaches of the UTPA are not actionable under West Virginia law, but rather it will not consider the insurer's conduct post-denial and after the declaratory judgment action was filed with regard to the third-party bad faith claim. Accordingly, Johnson is still good law and it is applicable to this case. As such, Noland's appeal on this ground should be denied.

III. NOLAND'S CAUSE OF ACTION FOR STATUTORY BAD FAITH FULLY ACCRUED WHEN VIR DENIED COVERAGE ON OCTOBER 24, 2000, AND THE ONE YEAR STATUTE OF LIMITATIONS PROPERLY RUNS FROM THE DENIAL OF COVERAGE.

Noland argues that his cause of action for first-party statutory bad faith has not yet accrued as the breaches of the UTPA are on-going throughout the pendency of the Noels' medical malpractice action. However, Noland's statutory bad faith claim is predicated on VIR's denial of coverage including its alleged failure to properly investigate the claim against Noland and assign Noland a separate adjuster. In fact, Noland's allegations in the Amended Complaint regarding VIR's alleged violations of the UTPA were specifically set forth in a letter from Noland's counsel to Stocks on May 8, 2001 – well within one year after the denial of coverage. Noland merely alleges these breaches to be on-going as VIR has not revoked its denial. First-party statutory bad faith claims arising from a denial of coverage are not like third-party claims in which the conduct of the insurer throughout the underlying litigation is on-going and is not complete until the underlying case is resolved in its entirety. The respondents actions ceased upon the denial of coverage and Noland was well-aware of his claim by that time. To hold otherwise would be to make all statutes of limitations regarding alleged breaches of contract meaningless. Accordingly, Noland's appeal on this ground should be denied.

Noland argues that the alleged breaches of the UTPA are occurring everyday the respondents do not assign a separate adjuster to his claim and obtain separate counsel for him in the Noels' medical malpractice action. Appellant Brief at p. 33. In other words, Noland believes the respondents' breaches of the UTPA from the denial of coverage are continuing in nature unless and until VIR provides coverage. However, Noland was aware of the alleged breaches within one year of the denial of coverage, but chose to sit on his rights rather than assert a timely statutory bad faith claim. In fact, Noland attached a letter from his counsel, Perry W. Oxley, to

Stocks, dated May 8, 2001 [the "May 8th letter"], to "Plaintiff's, Lloyd Michael Noland, Response to Defendants' Motions to Dismiss", filed on January 17, 2006. In the May 8th letter, Noland responds to a letter from Stocks, dated October 24, 2000, formally denying Noland a defense under the VIR policies for the counter-claim brought by BARH in the Noels' medical malpractice action. See Letter from Stocks to Noland (October 24, 2000); Letter from Oxley to Stocks (May 8, 2001). In the May 8th letter, Noland tells Stocks that he may personally be liable under the UTPA for his handling of Noland's claim. Id. Noland's rationale for informing Stocks that he may be liable for bad faith under the UTPA in the May 8th letter is exactly the same as the rationale for ultimately alleging bad faith under the UTPA in the Amended Complaint as this side-by-side comparison demonstrates:

May 8th Letter	**Complaint**
The Noel action was "generally underdeveloped regarding the exploration into alternative defenses[.] ... In particular, Dr. El-Khatib's care for Mr. Noel during his last day at work, Dr. Bassali for his role as radiologist and BARH for its actions, policies, procedures, credentialing and hiring practices. ... Because the defenses strategies set forth above were not zealously pursued, the defense of Mike Noland was inadequate at best." May 8, 2001 Letter from Oxley to Stocks at p. 2.	The Complaint alleges that the defendants failed to properly investigate this claim. Amended Complaint at ¶ 38, 39, and 45. Specifically, clear testimony from the plaintiff suggests that there are breaches of the standard of care by tortfeasors other than Mr. Noland, which his insurer completely failed to act upon in the underlying case. Plaintiff's, Lloyd Michael Noland's Responses to Defendants' Motions to Dismiss at p. 14.
"The failure to provide Mike Noland with a full and complete defense makes a complete assessment of Mr. Noland's liability nearly impossible at this time. ... Any zealous	"[T]he allegations in the Complaint suggest that the defendants failed to obtain separate counsel for Mr. Noland. Amended Complaint at ¶ 45.

defense of Mike Noland would necessarily include an investigation into these areas, and Mr. Foster was unable to pursue their theories because he was attempting to serve two masters by defending BARH and Mike Noland. May 8, 2001 Letter from Oxley to Stocks at p. 2.	Plaintiff's, Lloyd Michael Noland's Responses to Defendants' Motions to Dismiss at p. 14.

These alleged breaches as set forth in the May 8th letter and the Amended Complaint are predicated on the denial of coverage and not after October 24, 2000, except VIR's continued denial. Therefore, the right to bring an action against Stocks for any alleged breach of the UTPA accrued on or before October 24, 2000, when VIR, according to the May 8th letter, allegedly breached its duties under the UTPA by formally denying a defense to Noland in the Noel action.

To hold otherwise would make statutes of limitations with regard to contracts meaningless. Under general contract law, a cause of action for breach of contract accrues at the time of the breach or at the time the injured party became aware of the breach and not everyday thereafter in which the breach occurs. See Gateway Communications, Inc. v. Hess, 208 W.Va. 505, 541 S.E.2d 595 (2000) (Action for breach of contract accrues, and the statute of limitations begins to run, when the breach occurs or when the act breaching the contract becomes known); Plumley v. May, 189 W.Va. 734, 434 S.E.2d 406 (1993) (Statute of limitations in a direct action against an uninsured or underinsured motorist carrier begins to run when breach of contract occurs); McKenzie v. Cherry River Coal & Coke Co., 195 W.Va. 742, 466 S.E.2d 810 (1995) (Statute of limitations for breach of contract began to run on dates alleged breaching acts became known rather than on later date). Allowing the statute of limitations to accrue indefinitely would make the statute of limitations for contracts pointless since an injured party could assert breach

of contract indefinitely. The same rationale should apply to actions under the UTPA. Noland should not be able to toll the statue of limitations for UTPA claims indefinitely to suit his own ends. The alleged breach occurred on October 24, 2000, when TVIR formally denied Noland a defense in the Noel action. Therefore, Noland had one year from that date to assert his claims.

Accordingly, Noland had one year from that date in which to raise a cause of action for first-party statutory bad faith. Noland cannot fall back upon the idea of a "continuing breach" to assert that the statute of limitations has not accrued unless a statute of limitations is meaningless. Moreover, Noland was fully aware of the existence of and basis for his UTPA claims against the respondents on or about October 24, 2000 and the basis of his UTPA claim has not changed since that time. Accordingly, Noland's appeal on this ground should be denied.

IV. NOLAND'S FIRST-PARTY STATUTORY BAD FAITH CLAIMS DO NOT RELATE BACK.

Noland seeks to relate back his first-party statutory bad faith claims to the filing of the action over four years prior to the filing of the Amended Complaint. Noland makes every excuse imaginable to justify his failure to timely assert the statutory bad faith claims. However, all of these excuses are insufficient to permit relation back under Rule 15(c)(3) of the West Virginia Rules of Civil Procedure as Noland was not mistaken as to the identity of the additional parties added by way of the Amended Complaint. Accordingly, Noland's appeal on this ground should be denied.

Rule 15(c)(3) of the West Virginia Rules of Civil Procedure provides, in pertinent part, as follows:

> (c) *Relation back of amendments.* – An amendment of a pleading relates back to the date of the original pleading when:
>
> ***

> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) **knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against the party**.

(**emphasis** added) W.Va.R.Civ.P. 15 (2008). "Rule 15 is the only vehicle available for a plaintiff to amend the complaint to change or add a defendant after the statute of limitations has run." 3 James Wm. Moore et al., Moore's Federal Practice, ¶ 15.19(3)(a) (3d ed. 1997) quoted in Brooks v. Isinghood, 213 W.Va. 675, 683, 584 S.E.2d 531, 539 (2003). "Rule 15, by its own terms, is to be construed liberally in order to promote the consideration of claims on their merits." Brooks, Id. at 540, 684. However, "Rule 15(c) imposes restrictions in deference to the equally important purposes of the statute of limitations." Peneschi v. National Steel Corp., 170 W.Va. 511, 523, 295 S.E.2d 1, 13 (1982) quoted in Brooks, Id.

In Brooks v. Isinghood, this Court engaged in an extensive analysis of Rule 15, including mistakes concerning the identity of proper parties under Rule 15(c)(3)(B). 213 W.Va. 675, 584 S.E.2d 531. The appellant, Brooks, amended her complaint to include additional defendants after this Court held that government employees may be sued under the Governmental Tort Claims and Insurance Reform Act on a previous certified question. Brooks, Id. at 687, 543. After being added as defendants following the lapse of the applicable statute of limitations, the appellees, city employees added as defendants, appealed the lower court's relation back of Brooks' amended complaint asserting that Brooks' failure to name appellees in the original complaint was not a mistake, but rather deliberate strategy. Id. at 687-688, 543-544. This

Court, in holding that Brooks did not make a strategic and deliberate choice in failing to name the appellees, concluded as follows:

> [U]nder Rule 15(c)(3)(B), a "mistake concerning the identity of the proper party" can include a mistake by a plaintiff of either law or fact, so long as the plaintiff's mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy.
>
> In the instant case, [Brooks] knew of the identity of the appellees, but due to a mistaken interpretation of the law by [Brooks'] counsel did not comprehend until this Court's opinion was issued in [Brooks v. City of Weirton, 202 W.Va. 246, 503 S.E.2d 814 (1998)] on May 18, 1998, that the appellees were proper parties to be sued. [Brooks] did not make a conscious, deliberate strategic reason to not name the appellees, but did so based upon a reasonable reading of several statutes. It is clear, then, that [Brooks] made a mistake concerning the identity of the proper party as set forth by Rule 15(c)(3)(B).

Id at 690, 546. After determining that the appellees knew or reasonably should have known that they would have been sued in the original complaint but for the mistake, this Court held that the amended complaint would relate back. Id.

In the current action, Noland was not mistaken concerning the identity of the proper parties. Noland contends that Hyman, Stocks, COA, and KHA were not named in the original Complaint "because it was necessary for Mr. Noland to conduct an investigation to ascertain all the appropriate parties to this litigation." Appellant Brief at p. 34. However, Noland identified Hyman, Stocks, and COA in the original Complaint and their role in the alleged bad faith asserted against VIR.[4] Original Complaint at ¶¶ 16, 21-22. Noland's factual averments are identical in the Amended Complaint. Amended Complaint at ¶¶ 7, 21, 24-25. Noland was well

[4] KHA is alleged to be the limited liability company that wholly owns COA. Amended Complaint at ¶ 5.

aware of Hyman and Stocks' employment at COA and VIR and there was no mistake concerning their identity to justify relation back.

Further, a reasonable reading of the UTPA would not lead to a mistake concerning the identity of parties subject to statutory bad faith claims. The UTPA states that, "[n]o **person** shall engage in this state in any trade practice which is defined in this article as, or determined pursuant to section seven of this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." (**emphasis** added) W.Va. Code § 33-11-3 (2005). The UTPA defines "person" as, "any **individual**, company, insurer, association, organization, society, reciprocal, business trust, corporation, or any other legal entity, including agents and brokers." (**emphasis** added) W.Va. Code § 33-11-2 (2005). Presumably, counsel for Noland, was aware of the law.

Noland argues that he "has proceeded prudently in pursuing his claims against the defendants under the understanding that pursuant to Klettner, the statute of limitations begins to run four months after the appeal period in the underlying case expires." Appellant Brief at pp. 34-35. This statement evidences the fact that Noland was not mistaken as to Hyman, Stocks, COA, and KHA's identity and was aware of his claims against them under the UTPA. However, Noland withheld his claim against these parties for some strategic reason. As Brooks clearly states, "'a mistake concerning the identity of the proper party' can include a mistake by a plaintiff of either law or fact, so long as the plaintiff's mistake resulted in failure to identify, and assert a claim against, the proper defendant." Brooks, 213 W.Va. at 690, 584 S.E.2d at 546. Despite Noland's argument that he relied on Klettner and the Circuit Court's Memorandum dated July 27, 2005, for the proposition that the statute of limitations for first-party statutory bad faith tolled until the appeal period in the underlying action had expired, Noland had identified

these parties in the original Complaint and failed to assert a statutory bad faith claim against him. As such, Noland cannot rely on his interpretation of the statute of limitations in order to relate back the Amended Complaint to June 19, 2001. See e.g. Peneschi, 170 W.Va. at 523, 295 S.E.2d at 13 ("Rule 15(c) imposes restrictions in deference to the equally important purposes of the statute of limitations.") quoted in Brooks, Id. at 540, 684. As such, the Amended Complaint should not relate back to June 19, 2001, and Noland's appeal on this ground should be denied.

CONCLUSION

For the foregoing reasons, Richard Stocks respectfully requests that this Honorable Court deny the Brief of Appellant, Lloyd Michael Noland, R.N., and uphold the Circuit Court of Raleigh County's December 18, 2006 Order dismissing the first-party statutory bad faith claim against Appellee Richard Stocks and the March 28, 2008 Order denying Noland's Motion to Reconsider.

RICHARD STOCKS,

By Counsel,

Jeffrey M. Wakefield (WV Bar No. 3894)
Jaclyn A. Bryk (WV Bar No. 9969)
Elizabeth L. Taylor (WV Bar No. 10270)
FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C.
Post Office Box 3843
200 Capitol Street
Charleston, West Virginia 25338
Telephone: (304) 345-0200
Facsimile: (304) 345-0260

CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for Richard Stocks, do hereby certify that true and exact copies of the foregoing "**BRIEF OF APPELLEE RICHARD STOCKS**" was served upon the parties hereto by U.S. Mail, first class, postage prepaid, on this the 25th day of March, 2009, addressed to the following counsel of record:

D.C. Offutt, Jr., Esq.
Scott W. Andrews, Esq.
Perry W. Oxley, Esq.
Offutt & Nord
Post Office Box 2868
Huntington, West Virginia 25728
Counsel for Lloyd Michael Noland, R.N.

Joshua I. Barrett, Esq.
DiTrapano, Barrett & DiPiero, P.L.L.C.
604 Virginia Street, East
Charleston, West Virginia 25301
Counsel for The Virginia Insurance Reciprocal, The Reciprocal Group, and Lisa Hyman

Robert L. Massie, Esq.
Huddleston Bolen, LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
Counsel for Coverage Options Associates a/k/a Kentucky Hospital Service Company

J. Bradley Derifield, Esq.
250 W. Main Street
Suite 2700
Lexington, Kentucky 40507-1749
Counsel for Kentucky Hospital Association

Jeffrey M. Wakefield (WV Bar No. 3894)